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No. 85-2133

In the Supreme Court of the United States

OCTOBER TERM, 1986

CROUNSE CORPORATION, ET AL.,
PETITIONERS,

v.

INTERSTATE COMMERCE COMMISSION, ET AL.,
RESPONDENTS.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

1. Respondents CSX and ICC attempt to characterize the questions presented by petitioners as essentially factual, requiring this Court to review the extensive administrative record and findings made below. That is simply not so. The questions which petitioners ask this Court to review are fundamental questions of law involving the proper interpretation of the Panama Canal Act, a statute which since 1912 has guaranteed vigorous competition between rail and water carriers in this country. The questions of law presented concern the essential purpose of the Act and the proper scope of its exception, and they have sharply divided the judiciary throughout this case.[1]

[1] Judge Greene dissented from the decision of the District of Columbia Circuit approving CSX's use of a voting trust to hold the stock of ACL pending ICC approval; he stated in his dissent that the merger of CSX and ACL

CSX and ICC misstate petitioners' position. Petitioners do not argue, as CSX and ICC suggest, that the Act contains an absolute prohibition on rail-barge mergers. Quite the contrary, petitioners recognize the Act contains an exception, but their position is that the exception is precisely that, an exception. Consistent with the intended purpose of the Act to preserve rail-barge competition, Congress deliberately prohibited railroads from acquiring competing water carriers excepting only those acquisitions satisfying a stringent test that competition not be reduced. The Court of Appeals has fundamentally misconstrued the Act and its exception by holding that the ICC need not consider the impact of a rail-barge merger on rail-barge competition.

2. Respondents do not even agree among themselves as to whether the Court of Appeals correctly interpreted the Act. CSX parrots the Court's simplistic analysis that "[b]arges, not trains, operate on water routes," and restates its conclusion that the ICC need not consider rail-barge competition at all but can limit its consideration to barge-barge competition (CSX Br. 16).

The ICC, by contrast, is apparently unwilling to embrace the Court of Appeals' analysis and conclusion. It all but concedes the petitioners' challenge is well-founded (ICC Br. 11 n.10). But the ICC suggests the Court of Appeals did not mean what it said, *i.e.*, that the Court did not *really* mean that the ICC can completely ignore rail-barge competition. However, the language of the majority opinion admits of no such interpretation. The Court of Appeals held, as a matter of law, that the ICC was not required to consider the impact of the merger on rail-barge competition (App. A, 13a).

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must ultimately be disapproved by the ICC when reviewed under the Act "unless the ICC should at that time again apply its own policy rather than the congressional view of the proper relationships in the rail-water market." *Water Transport Association* v. *ICC*, 715 F.2d 581, 601 & n.25 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1006 (1984). In the Sixth circuit, Judge Timbers dissented from the majority opinion (App. A, 32a) and four other judges dissented from the denial of rehearing *en banc*, with Judge Merritt authoring a four-page dissenting opinion (App. D, 44a).

The ICC then attempts to downplay the importance of any error in the Court of Appeals' construction of the Act by arguing that the Commission did in fact consider the impact of the CSX/ACL merger on rail-barge competition (ICC Br. 11). But if there is anything the judges in the Court of Appeals agreed upon, it is that the ICC failed to consider the acquisition's impact on rail-barge competition. The majority opinion expressly stated that the ICC "looked *only* at the effect the merger would have on competition among water carriers, and *ignored the effect on rail-barge competition.*" (App. A, 5a) (emphasis added). Judge Timbers in his dissent stated that the "essential, and fatal, error upon which the ICC's decision is based, is its utter failure to consider the effect of this acquisition on *competition between railroads and bargelines.*" (App. A, 33a) (emphasis added). In his dissent from the denial of rehearing *en banc*, Judge Merritt, joined by three other judges, flatly stated that the ICC "refused to look at what effect the merger . . . will have on *rail-barge competition* . . . ." (App. D, 45a) (emphasis added).[2] Thus, not only did the Court of Appeals misinterpret the Act, but the findings with respect to rail-barge competition which would have been necessary under the correct interpretation were simply not made by the agency.[3]

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[2] Contrary to the ICC's contention (ICC Br. 11), the Court of Appeals nowhere held that the ICC's consideration of rail-barge competition "was ample to satisfy the statutory standard."

[3] CSX takes issue with the Court of Appeals in a different respect. The Court of Appeals held that predatory pricing was the only evil addressed by the Act (App. A, 7a-9a). CSX concedes that predatory pricing was just one of a number of practices used by railroads to harm independent barge lines prior to 1912, practices which motivated Congress to pass the Act. CSX Br. 13-14. However, CSX suggests the Court of Appeals did not really intend to hold that predatory pricing was the sole evil addressed by Congress. The difficulty with that position is that the Court of Appeals said just that, and it also said that if Congress had a broader purpose, then the petitioners' arguments had merit (App. A, 9a-10a).

The inability of respondents to agree with the Court of Appeals, or even with each other, as to the proper interpretation of the Act underscores the importance of the questions of law presented by petitioners in this case and the need for plenary review by this Court.

3. At the heart of the legal issues raised in this case is the question whether the Act was designed to promote rail-barge competition, or simply competition among barge lines. CSX concedes that "Congress in 1912 was concerned with possible railroad domination of barge carriers and with the exploitation of railroad-owned vessels to drive independent water carriers out of business." (CSX Br. 16). CSX concludes from that history, however, that the Act was thus clearly aimed at preserving "barge competition" and that the ICC could thus focus its competitive analysis on the "barge industry." That conclusion simply does not follow. If Congress was concerned with protecting barge lines from railroads, it was manifestly concerned with rail-barge competition, not barge competition in the abstract.

The ICC's own decisions, including a decision by the ICC at an earlier stage of this case, state that the fundamental purpose of the Act was to preserve rail-water competition:

> The debates . . . in the House and Senate also clearly demonstrate that Congress had in mind relationships potentially adversely affecting *rail-water competition* . . . . In sum, the test of whether an interest is prohibited . . . is whether the relationship enables the railroad to adversely affect *competition from water carriers* . . . .

Water Transport Association—Petition for Declaratory Order—American Commercial Lines Voting Trust, 367 I.C.C. 559, 565-66 (1983) (emphasis added), *aff'd sub nom. Water Transport Association* v. *ICC*, 715 F.2d 581 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1006 (1984). The District of Columbia Circuit in the voting trust case also concluded that the

Act was designed "to preserve rail-water competition by barring railroads from owning or controlling competing water carriers." 715 F.2d at 587. It defies logic to suggest, as CSX does, that a statute designed to protect rail-barge competition, and triggered by the existence of such competition, can be construed to dispense with an analysis of such competition.

4. CSX cites in Appendix B to its brief some 34 ICC decisions since 1912 approving "rail interests in competing water carriers." (CSX Br. 14 n.21). Not even the ICC offers such sweeping generalizations of its prior cases, and with good reason. The cases cited by CSX were not even remotely close to the transaction approved in this case.

The first case listed by CSX is this case. Of the remaining cases, there are instances where the ICC found the rail and water carriers did not even compete, and thus there was no need to consider the Act's exception.[4] Nineteen of the cases listed, including the three cases CSX asserts involved "railroad interests in substantial water carrier operations" (CSX Br. n.21), have previously been categorized by the ICC itself as cases in which "the Commission regarded the railroad interest in the water carrier as an extension of the railroad's route or as a means of bridging lakes or bays between rail points." *Southern Railway Co.*, 342 I.C.C. 416, 441 (1972). The rest of the cases involved situations where the reduction in competition was immaterial, including cases where the rail-owned water carriers provided an essential service and the application was not opposed,[5] or where the railroad owned only a minority interest in a water carrier.[6]

The prior ICC decisions cited by CSX are consistent with petitioner's position that the Act's exception is a stringent one. In no case prior to this one has the ICC approved a railroad interest in a water carrier where the competition involved

[4] *E.g.*, *Canadian Pacific Railway Co.*, 225 I.C.C. 81, 86 (1937).

[5] *E.g.*, *Southern Pacific Co.*, 34 I.C.C. 174, 176 (1915); *compare Southern Railway Co.*, *supra*, 342 I.C.C. at 442 n. 8 *with* the analysis at note 18 of the I.C.C.'s decision in this case (App. E, 79a & n. 18).

[6] *E.g.*, *Missouri Pacific Railroad Co.*, 245 I.C.C. 143, 150-151 (1941).

parallel rail and water lines and where the competition was of the magnitude involved between CSX and ACL. Indeed, this is the first acquisition of a competing water carrier allowed in the history of the Act.[7] The ICC itself conceded that "in many respects this is a case of first impression. . . ." (App. E, 145a).

5. The legal issues concerning the proper interpretation of the Act warrant this Court's attention in this case. If the merger of the nation's largest barge line with the nation's second largest railroad can satisfy the Act's exception, then no other rail-barge merger can fail to pass muster, and the ICC will have effectively nullified the Act. Given the nature of the prior competition between CSX and ACL, approval of this merger necessarily will establish the bounds of the exception at a point which effectively swallows the rule.

The ICC suggests that economic conditions have changed in the transportation industry since the Act was passed in 1912 (ICC Br. 13). Of course those conditions have changed, but the fact is they have changed in a way which makes application of the Act more imperative than at any point in its history. Since 1912 the number of major railroads in the eastern United States has steadily decreased to the point that today there are only three Class I railroads in the east, and only seven in the entire country, each basically serving separate regions (*See* Pet. Br. 10 & n.8). Thus, the railroads with which independent water carriers must compete are larger and more powerful than ever before. Although the number of water carriers has increased since 1912, that is simply proof the Act has worked as Congress intended, not a signal to abandon it. In any event, any decision to repeal the Act is for Congress, not the ICC.

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[7] As CSX recognizes, the other cases cited by CSX involved attempts by railroads to resist the mandate of divestiture imposed by the Act (itself a remarkable phenomenon in the history of antitrust legislation) for water carriers owned prior to 1912, or attempts to start new water carriers or service.

Respondents point to the oversight proceedings as a cure-all for whatever deficiencies exist. They suggest that the requirements of the Act are satisfied so long as the ICC retains jurisdiction. But the ICC has no power to conditionally approve a rail-barge merger. That approach was specifically rejected by Congress in 1912 and by the ICC in early decisions under the Act (*See* Pet. Br. 4 n.6, 19 n.12). Moreover, the use of oversight is contrary to the essential premise of the Act—Congress presumed that anti-competitive practices are inherent in a rail-barge combination and therefore banned the structure which permitted them, with a stringent exception. The ICC in effect has administratively overturned that congressional premise and taken it upon itself to presume the opposite, *i.e.*, that railroads are not likely to engage in anti-competitive practices if allowed to acquire competing barge lines today.[8]

Respondents suggest that the merger will actually increase competition by allowing CSX and ACL to compete more effectively for waterborne traffic (CSX Br. 8, 11; ICC Br. 5 n.5). Respondents assert that the merger allows CSX/ACL to provide single-system shipping, to introduce new intermodal price and service options, and to achieve substantial cost savings and increased productivity, all of which they say will provide shippers with the convenience of dealing with one carrier and the possibility of lower rates (*Id.; see also* App. E, 57a-62a, 143a-145a). But such benefits were rejected by the ICC in prior decisions as an adequate basis for approval under the Act (*See* Pet Br. 19 & n.12). Moreover, these benefits are, by the ICC's analysis, available only to the rail-barge combination.[9]

[8] The ICC offers the difference in rail and water rates as a justification for failing to analyze rail-barge competition (ICC Br. 4). As CSX admits, however, water rates were also lower than rail rates when Congress passed the Act (CSX Br. 13), which condition was the motivation for railroads to acquire water carriers and attempt to drive out independent water carriers.

[9] As a matter of fact, most of the benefits of joint operation perceived by the ICC could have been achieved before the merger as the result of contracts between rail and water carriers. Petitioners do not seek to prevent the offering of innovative services to shippers, but rather to compete in a market in which all barge carriers can compete on equal terms, with resulting benefits to shippers.

Thus, the effect of the ICC's approval will be to confer upon a single consolidated entity a permanent competitive advantage which no independent barge line can match no matter how hard it tries.

Judge Timbers accurately predicted the inevitable result of this decision in his dissenting opinion:

> Finally, the assumption that other barge carriers will have a nearly equal opportunity to compete with ACL for CSX-generated traffic is belied by the ICC's heavy emphasis on the supposed "efficiencies" that will result from this merger. If those "efficiencies" are as great as the ICC suggests, other water carriers will not be able to compete effectively with ACL even if given the opportunity; and, it can be predicted, the ICC will rely in the future on this imbalance to justify mergers of other water carriers with railroads, ultimately defeating Congress' goal of separate ownership of water and rail carriers.

(App. A, 38a). The respondents assert that approval of this particular rail-barge merger does not guarantee that all rail-barge mergers will hereafter be approved.[10] They suggest the

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[10] Both CSX and ICC suggest that this is a routine transaction of no consequence. CSX asserts, for example, that the barge market is relatively unconcentrated and that ACL's share of the market is less than 7% (CSX Br. 5, 6 n.8). That, of course, is based simply on the ICC's aggregation of data concerning all barge activity of whatever nature occurring anywhere in the eastern half of the country. It does not rest on any principled analysis of relevant product and geographic markets. Under a correct interpretation of the statute and established principles of market definition, the combined post-merger shares of ACL and CSX in several commodity and geographic markets are dramatic. For example, prior to the acquisition CSX had a 48.3% market share of all coal moved by Class I railroads in the east (App. A, 2a); ACL, even accepting the ICC's figures, was among the top four coal-carrying barge lines which together accounted for about one-half of all barge-coal traffic (App. E, 129a). As a result of the merger, CSX/ACL achieved market shares exceeding 50%, and in some cases reaching 80%, for coal moving from commonly served orgins to particular states. For eastern coal moving to Kentucky, for example, CSX/ACL achieved a market share of 60%, with a

Act will continue to have vitality and that the ICC will assess each case on its own merits (CSX Br. 21; ICC Br. 12). But consider the result if the ICC did in fact refuse to approve the next rail-barge merger involving an independent barge line on the water system served by CSX/ACL. That would have the exceedingly perverse result that CSX/ACL would be the *only* carrier permitted to enjoy the unique competitive advantages of joint operation. Certainly the ICC could not permit that to happen and Judge Timbers is thus correct that further rail-barge mergers are inevitable.

Because of the severe contraction in Class I railroads, the number of railroad partners for independent water carriers will be small and the number of possible rail-barge combinations limited, restricting shippers options. Moreover, because the remaining Class I railroads today each basically serve separate regions of the country, shippers will be unable to obtain the benefits of using independent water carriers in areas served predominately by CSX. Judge Merritt focused on this problem in his dissent from the Sixth Circuit's refusal to allow rehearing *en banc:*

> The railroad in question controls 50% of the barge terminals on the river system in question, and all of the terminals on large stretches thereof. If, after buying the barge line in question, the railroad restricts the use of its terminals to that barge company, it will eliminate competition among barge lines that haul coal and other commodities to and from those terminals. Given the number of termi-

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post-merger Herfindahl-Hirschman Index ("HHI") of 3,660, and an increase in HHI of 595. Such HHI's would signal dangerous reduction in competition under the Department of Justice merger guidelines.

Petitioners do not, however, ask this Court to engage in a review of such data, nor is such review necessary to decide the questions of law presented here. Due to a fundamental misconstruction of the Act, analysis of figures concerning rail-barge competition did not form the basis for the decisions by the Court of Appeals and ICC below, and the figures are cited by petitioners only to illustrate the fundamental flaw in the decision below.

nals involved, it is inconceivable that the merger in question will not result in a reduction of competition on the water routes in question.

(App. D, 45a).

It is for these reasons petitioners argue that the Court of Appeals' decision, if allowed to stand, will fundamentally alter the nature of the transportation industry in this country. This case may well be the last case and it demands this Court's review.

Respectfully submitted,

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